No. 83-278

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1983

TURNER ROBINSON BOBO,

Petitioner,

v.

KENNETH DUCHARME, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Where, at the time this federal habeas corpus action was filed, there was uncertainty as to the availability of a state remedy, and where, subsequent to dismissal of the petition on exhaustion grounds, the state court confirmed the availability of a remedy, was it error for the Court of Appeals to uphold dismissal of the petition?

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STATEMENT OF THE CASE

For purposes of their opposition to this petition, respondents (hereinafter "Washington" or "the State") accept petitioner's statement of the case, as set forth at pages 4-10 of the petition.

Reasons for Denying the Writ

I. The Question Presented Turns On An Erroneous Interpretation of State Law.

Petitioner's fundamental assumption, upon which he premises the question presented, is that at the time this habeas action was filed no state remedy was available to him. He insists that a state remedy, in the form of a personal restraint petition under Washington Rules of Appellate Procedure 16.3-16.15, did not become available to him until this case was on appeal. This assumption is erroneous.

The availability of a state remedy is, of course, a question of state law. *Thomas v. Wyrick*, 622 F.2d 411 (8th Cir. 1980). In this case, the district court, which presumed to be most familiar with local law, *sua sponte* determined that at the time this action was filed petitioner had an available means of raising the unexhausted *Mullaney* issue[1] in the state courts.

On appeal to the Ninth Circuit, petitioner urged that the decision of the Washington Supreme Court in *In re Myers*, 91 Wash.2d 120, 587 P.2d 532 (1978), *cert. denied, sub. nom. Myers v. Washington*, 422 US. 912 (1979), foreclosed collateral review of this issue. The State argued that the holding of *Myers*—that a constitutional claim was not raised at trial or on direct appeal would not be considered in a personal restraint petition—was not an inflexible bar to collateral review in petitioner's case.

Even after its decision in *Myers*, the Washington court was careful to note the flexible nature of its procedural bar; saying that:

> [U]nder our construction of RAP 16.4 and its predecessor, there have always been some conflicting decisions. * * * The nature of the remedy has always required, and will continue to require, that consideration be given somewhat on a case-by-case basis without ironclad adherence to rules set out in previous decisions.

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[1] *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

In re Haynes, 95 Wash.2d 648, 652-653, 628 P.2d 809, 812 (1981) (citations omitted). *Haynes* was decided on May 28, 1981, almost six months prior to the district court's dismissal of this action.

The most recent decisions of the Washington Supreme Court, which petitioner contends signaled a new and more liberal rule, merely represent a formalization of that court's previous "case by case" approach. *In re Hagler*, 97 Wash.2d 818, 650 P.2d 1103 (1982) and *In re Hews*, 99 Wash.2d 80, 660 P.2d 263 (1983) merely quantify the showing which must be made in order to raise a previously unobjected-to issue in a collateral proceeding. After again noting its inconsistent decisions under the *Myers* rule, 99 Wash.2d at 86, 660 P.2d at 266, the *Hagler* court held that a constitutional issue could be raised for the first time in a personal restraint petition where the petitioner shows "actual prejudice stemming from a constitutional error." 99 Wash.2d at 87, 660 P.2d at 267.

Given the Washington court's admitted inconsistency in applying the *Myers* procedural bar, the holding of *Hews* and *Hagler* can hardly be characterized as a startling new development. Indeed, the Ninth Circuit, in a decision rendered two days before its affirmance in this case, analyzed the "tortuous course" of the Washington cases defining the availability of the collateral review of criminal judgments. *See, Kreck v. Spalding*, 703 F.2d 1108, 1116 (9th Cir. 1983). After considering Washington decisions rendered both before and after *In re Myers*, but without discussing either *Hagler* or *Hews*, the Court of Appeals was led to conclude:

> **that there exists no clear procedural policy in the State of Washington barring collateral review of a criminal judgment on the basis of a constitutional issue not raised on direct appeal. Moreover, even if Washington's procedural rules did generally bar collateral review of constitutional claims which could have been raised on appeal but were not * * * [w]e find the development of an exception to the procedural policy barring collateral review of unobjected to errors when they affect a fundamental constitutional right.**

703 F.2d at 1117-1118 (footnote omitted).

Thus, not only is it absolutely clear that petitioner presently has an available state remedy, it is equally clear that at the time his habeas petition was filed pursuit of that state remedy would not have been, as is required to excuse failure to do so, "clearly * * * futile." *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981). Therefore, the question which petitioner seeks to have this Court review is not, in fact, presented.

II. There Is No Conflict Between The Decision Below and the Applicable Decisions of This Court.

Even assuming it would have been clearly futile for petitioner to pursue state collateral review of the unexhausted *Mullaney* issue at the time this federal habeas action was filed, we submit that no right of petitioner's was violated when, prior to any action on the merits by the federal habeas court, he was required to pursue a newly available state remedy. No judicial diseconomy resulted from this course, since the state court is in as good a position to reach the merits as the federal court, and, indeed, but for his present appeals, petitioner would not have been further delayed.

Moreover, the decision below advances proper operation of the federal system and comity between state and federal courts, as is the intent of 28 U.S.C. §2254(b).

> The exhaustion doctrine is a judicially crafted instrument which reflects a careful balance between important interests of federalism and the need to preserve the writ of habeas corpus as a 'swift and imperative remedy in all cases of illegal restraint or confinement.'

Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484, 490 (1973) (citations omitted).

> The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings.

Rose v. Lundy, 455 U.S. 509, 518 (1982).

In furtherance of this policy, this Court established a "rigorously enforced total exhaustion rule" in *Rose v. Lundy, supra*.

Petitioner attempts to circumvent these principles through reliance on several of this Court's cases where it was clear, generally as a result of a prior ruling by a state court, that no state remedy was available. *See, e.g. Engle v. Isaac*, 456 U.S. 107, 125 (1982); *Fay v. Noia*, 372 U.S. 391, 396, n. 3 (1963). These cases, and the language from them on which petitioner relies, hardly speak to the instant situation where no attempt has ever been made to present the *Mullaney* issue to the state courts and where it is admitted that the means to do so exists.

The state submits that on these facts petitioner cannot demonstrate that his case is materially different from *Rose v. Lundy, supra*. He has demonstrated no prejudice to any right of his which outweighs those interests in the proper relation of federal and state courts embodied in §2254(b) and this Court's decisions.

CONCLUSION

The State of Washington respectfully submits that no substantial federal question is presented by this petition and that the decision below is in accordance with the precedents established by this Court. For these reasons, the petition for a writ of certiorari should be denied.

DATED this 5th day of October, 1983.

Respectfully submitted,

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